

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
:
In re: : Chapter 11
:
SEARS HOLDINGS CORPORATION, *et al.*,¹ :
:
Debtors. : Case No. 18-23538-rdd
:
: (Jointly Administered)
:
-----X

**APPELLANTS ESL INVESTMENTS, INC. AND TRANSFORM HOLDCO LLC’S
STATEMENT OF ISSUES TO BE PRESENTED AND
DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD ON APPEAL**

Appellants ESL Investments, Inc. and certain of its affiliated entities (including JPP, LLC and JPP II, LLC (collectively, “ESL”)) and Transform Holdco LLC (“Transform”), by and through their undersigned counsel, hereby respectfully submit, pursuant to Rule 8009 of the Federal Rules of Bankruptcy Procedure and Rule 8009-1 of the Local Bankruptcy Rules for the Southern District of New York, this statement of issues to be presented and designation of items

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are as follows: Sears Holdings Corporation (0798); Kmart Holding Corporation (3116); Kmart Operations LLC (6546); Sears Operations LLC (4331); Sears, Roebuck and Co. (0680); ServiceLive Inc. (6774); SHC Licensed Business LLC (3718); A&E Factory Service, LLC (6695); A&E Home Delivery, LLC (0205); A&E Lawn & Garden, LLC (5028); A&E Signature Service, LLC (0204); FBA Holdings Inc. (6537); Innovel Solutions, Inc. (7180); Kmart Corporation (9500); MaxServ, Inc. (7626); Private Brands, Ltd. (4022); Sears Development Co. (6028); Sears Holdings Management Corporation (2148); Sears Home & Business Franchises, Inc. (6742); Sears Home Improvement Products, Inc. (8591); Sears Insurance Services, L.L.C. (7182); Sears Procurement Services, Inc. (2859); Sears Protection Company (1250); Sears Protection Company (PR) Inc. (4861); Sears Roebuck Acceptance Corp. (0535); SR-Rover de Puerto Rico, LLC (f/k/a Sears, Roebuck de Puerto Rico, Inc.) (3626); SYW Relay LLC (1870); Wally Labs LLC (None); SHC Promotions LLC (9626); Big Beaver of Florida Development, LLC (None); California Builder Appliances, Inc. (6327); Florida Builder Appliances, Inc. (9133); KBL Holding Inc. (1295); KLC, Inc. (0839); Kmart of Michigan, Inc. (1696); Kmart of Washington LLC (8898); Kmart Stores of Illinois LLC (8897); Kmart Stores of Texas LLC (8915); MyGofer LLC (5531); Rover Brands Business Unit, LLC (f/k/a Sears Brands Business Unit Corporation) (4658); Sears Holdings Publishing Company, LLC. (5554); Sears Protection Company (Florida), L.L.C. (4239); SHC Desert Springs, LLC (None); SOE, Inc. (9616); StarWest, LLC (5379); STI Merchandising, Inc. (0188); Troy Coolidge No. 13, LLC (None); BlueLight.com, Inc. (7034); Sears Brands, L.L.C. (4664); Sears Buying Services, Inc. (6533); Kmart.com LLC (9022); Sears Brands Management Corporation (5365); and SRe Holding Corporation (4816). The location of the Debtors’ corporate headquarters is 3333 Beverly Road, Hoffman Estates, Illinois 60179.

to be included in the record on appeal with respect to their appeal of this Court's *Order (I) Confirming Modified Second Amended Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors and (II) Granting Related Relief* (ECF No. 5370) (the "Appealed Order")² before the United States District Court for the Southern District of New York (the "District Court") at Case No. 19-cv-09703 (NSR).

STATEMENT OF ISSUES ON APPEAL

On October 15, 2019, this Court entered the Appealed Order confirming the *Modified Second Amended Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors* (ECF No. 5293) (the "Plan") proposed by appellees Sears Holdings Corporation and its affiliates ("Sears" or the "Debtors"). The Appealed Order also approved the documents comprising the Plan Supplement (as defined in the Plan) (ECF Nos. 4632, 4703, 5295), which includes the Liquidating Trust Agreement (ECF No. 5295) (as defined in the Plan), and the Administrative Expense Claims Consent Program (as defined in the Appealed Order) described in the *Notice of Filing of Revised Administrative Expense Claims Consent Program Term Sheet with the Ad Hoc Vender Group and Creditors' Committee* (the "Administrative Expense Claims Consent Program Term Sheet," collectively with the Plan and the Plan Supplement, the "Plan Documents") (ECF No. 5301).

Despite the confirmation of the Debtors' Plan, a number of issues pertaining to the claims of ESL and Transform against the Debtors remain unresolved. Holders of Second Lien Debt (as defined in the Plan), including ESL, have appealed this Court's August 5, 2019 order regarding the determination of the amount of their secured and adequate protection super-priority claims under section 507(b) of the Bankruptcy Code, which appeals have been substantively

² Capitalized terms used but not otherwise defined herein shall have the respective meanings ascribed to such terms in the Appealed Order or the Plan, as applicable.

consolidated before the District Court at Case Nos. 19-cv-07660 (VB), 19-cv-07697 (VB), 19-cv-07782 (VB) (the “507(b) Appeals”). In addition, Transform believes that the Debtors have breached certain of their obligations under the Asset Purchase Agreement and Transform may assert Administrative Expense Claims on account of those breaches.

As a result of these pending issues, ESL and Transform objected to the provisions of the Appealed Order and Plan Documents that could be interpreted to limit the assets from which ESL and Transform could recover if their secured, administrative expense, or section 507(b) super-priority claims are allowed at a later time, including on appeal. *See, e.g., Limited Objection and Reservation of Rights of ESL Investments, Inc. and Transform Holdco LLC to Debtors’ Plan Supplement* (ECF No. 4786); *Supplemental Response of ESL Investments Inc. and Transform Holdco LLC to Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors* (ECF No. 5192); *Response of ESL Investments, Inc. and Transform Holdco LLC to Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors and Administrative Expense Claims Consent Program* (ECF No. 5320). The Appealed Order and the Plan Documents, however, did not make any clarification to accommodate ESL and Transform’s objections in this regard.

ESL and Transform are therefore appealing the Appealed Order to the extent that any provisions of the Order or any of the Plan Documents could be interpreted to limit the assets of the Debtors or of the Liquidating Trust to be established under the Plan from which ESL and Transform could seek and obtain payment on account of secured, administrative expense, or Section 507(b) super-priority claims that may be later allowed (except as previously agreed in Section 9.13(c) of the Asset Purchase Agreement).

ESL and Transform intend to present the following issue on appeal:

1. Did the bankruptcy court err in entering the Appealed Order and approving the Plan Documents to the extent any provision thereof could be read to limit the assets from which ESL and Transform could seek and obtain payment on account of secured, administrative expense, or Section 507(b) super-priority claims when and if those claims are allowed, including on appeal, other than as set forth in Section 9.13(c) of the Asset Purchase Agreement?

DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD ON APPEAL³

ESL and Transform designate the following items for inclusion in the record on appeal. Each designated item shall also include any and all exhibits and documents annexed to and referenced within such items.⁴

Docket No.	Docket Entry Date	Description
3	10/15/2018	Declaration of Robert A. Riecker Pursuant to Rule 1007-2 of Local Bankruptcy Rules for Southern District of New York, with Exhibit A and Schedules
101	10/16/2018	Interim Order (I) Authorizing the Debtors to (A) Obtain Post-Petition Financing, (B) Grant Senior Secured Priming Liens and Superpriority Administrative Expense Claims, and (C) Utilize Cash Collateral; (II) Granting Adequate Protection to the Prepetition Secured Parties; (III) Modifying the Automatic Stay; (IV) Scheduling Final Hearing; and (V) Granting Related Relief, with Exhibits A to B
951	11/30/2018	Interim Junior DIP Order (I) Authorizing the Debtors to (A) Obtain Post-Petition Financing and (B) Grant Secured Priming Liens and Superpriority Administrative Expense Claims; (II) Modifying the Automatic Stay; (III) Scheduling Final Hearing; and (IV) Granting Related Relief, with Exhibits A to B.

³ All documents designated herein have a docket number reference. Accordingly, pursuant to Rule 8009-1(a) of the Local Bankruptcy Rules for the Southern District of New York, no documents must be attached or filed herewith.

⁴ Except as otherwise specified herein, all references to “Docket No.” shall refer to the docket numbers on the bankruptcy court docket at Case No. 18-23538-rdd.

Docket No.	Docket Entry Date	Description
955	11/30/2018	Final Order (I) Authorizing the Debtors to (A) Obtain Post-Petition Financing, (B) Grant Senior Secured Priming Liens and Superpriority Administrative Expense Claims, and (C) Utilize Cash Collateral; (II) Granting Adequate Protection to the Prepetition Secured Parties; (III) Modified the Automatic Stay; and (IV) Granting Related Relief, with Exhibits A to C
1436	12/28/18	Final Junior DIP Order (I) Authorizing the Debtors to (A) Obtain Post-Petition Financing and (B) Grant Secured Priming Liens and Superpriority Administrative Expense Claims; (II) Modifying The Automatic Stay; and (III) Granting Related Relief, with Exhibits A to B
1730	1/18/2019	Notice of Successful Bidder and Sale Hearing, with Exhibits A to B
2456	2/7/2019	Notice of Filing Amendment to the Asset Purchase Agreement, with Exhibits A to B
2507	2/8/2019	Order (I) Approving the Asset Purchase Agreement among Sellers and Buyer, (II) Authorizing the Sale of Certain of the Debtors' Assets Free and Clear of Liens, Claims, Interests and Encumbrances, (II) Authorizing the Assumption and Assignment of Certain Executory Contracts, and Leases in Connection Therewith and (IV) Granting Related Relief, with Exhibit A to B
3275	4/17/2019	Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors
3988	5/22/2019	Objection of ESL Investments, Inc. to Disclosure Statement for Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors
4044	5/28/2019	Debtors' Omnibus Reply to Objections to Debtors' Disclosure Statement and Solicitation and Voting Procedures, with Exhibit A
4276	6/18/2019	ESL's Demand for Payment
4316	6/21/2019	Stipulation and Order Concerning the Resolution of Certain Section 507(b) Claims
4389	6/28/2019	Second Amended Joint Chapter 11 Plan of Sears Holdings Corporation and its Affiliated Debtors

Docket No.	Docket Entry Date	Description
4390	6/28/2019	Disclosure Statement for Second Amended Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors, with Exhibits A to E-2
4392	6/28/2019	Order (I) Approving Disclosure Statement, (II) Establishing Notice and Objection Procedures for Confirmation of the Plan, (III) Approving Solicitation Packages and Procedures for Distribution Thereof, (IV) Approving the Forms of Ballots and Establishing Procedures for Voting on the Plan, and (V) Granting Related Relief, with Exhibits A to E
4478	7/9/2019	Disclosure Statement for Modified Second Amended Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors, with Exhibits A to E-2
4632	7/26/2019	Notice of Filing of Plan Supplement in Connection with Modified Second Amended Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors, with Exhibits A to F
4703	8/2/2019	Notice of Filing of Plan Supplement in Connection with Modified Second Amended Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors, with Exhibit B (Liquidating Trust Agreement)
4704	8/2/2019	Modified Second Amended Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors
4740	8/5/2019	Order Determining the Amount of Second-Lien Holders' Section 507(b) Administrative Claims Pursuant to Rule 3012 of the Federal Rules of Bankruptcy Procedure
4759	8/6/2019	Limited Objection and Reservation of Rights of ESL Investments, Inc. and Transform Holdco LLC to Joint Chapter 11 Plan of Sears Holdings Corporation and its Affiliated Debtors
4760	8/6/2019	Declaration of Chelsey Rosenbloom in Support of Limited Objection and Reservation of Rights of ESL Investments, Inc. and Transform Holdco LLC to Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors, with Exhibit A
4786	8/7/2019	Limited Objection and Reservation of Rights of ESL Investments, Inc. and Transform Holdco LLC to Debtors' Plan Supplement

Docket No.	Docket Entry Date	Description
4793	8/8/2019	Order Determining the Amount to Surcharge Second-Lien Collateral Pursuant to Section 506(c) of the Bankruptcy Code
4832	8/14/2019	Notice of Appeal of ESL Investments, Inc. to 507(b) Order, with Exhibit A
4839	8/14/2019	Notice of Appeal of Wilmington Trust, National Association to 507(b) Order, with Exhibit A
4845	8/14/2019	Notice of Appeal of Cyrus Capital Partners, L.P. to 507(b) Order, with Exhibit A
4941	8/21/2019	Notice of Appeal of Debtors to 506(c) Order, with Exhibit A
4954	8/22/2019	Notice of Appeal of the Official Committee of Unsecured Creditors of Sears Holdings Corporation, et al. to 506(c) Order, with Exhibit A.
5142	9/13/2019	Notice of Filing of Proposed Order Confirming Modified Second Amended Joint Chapter 11 Plan of Sears Holding Corporation and Its Affiliated Debtors, with Exhibit A
5144	9/13/2019	Debtors' Memorandum of Law in Support of Confirmation of Modified Second Amended Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors, with Exhibits A to B
5146	9/13/2019	Declaration of William L. Transier in Support of Modified Second Amended Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors, with Exhibits A to B
5148	9/13/2019	Declaration of Brian J. Griffith in Support of Confirmation of Modified Second Amended Joint Chapter 11 Plan of Sears Holdings corporation and Its Affiliated Debtors, with Exhibits A to C
5149	9/13/2019	Declaration of William Murphy in Support of Confirmation of Modified Second Amended Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors, with Exhibits A to C
5192	9/19/2019	Supplemental Response of ESL Investments, Inc. and Transform Holdco LLC to Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors

Docket No.	Docket Entry Date	Description
5293	10/1/2019	Modified Second Amended Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors
5295	10/1/2019	Notice of Filing of Revised Plan Supplement in Connection with Modified Second Amended Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors, with Exhibits B and 1
5296	10/1/2019	Debtors' Supplemental Memorandum of Law in Support of Confirmation of Modified Second Amended Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors, with Exhibits A to C
5297	10/1/2019	Supplemental Declaration of Brian J. Griffith in Support of Confirmation of Modified Second Amended Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors
5301	10/1/2019	Notice of Filing of Revised Administrative Expense Claims Consent Program Term Sheet With The Ad Hoc Vender Group and Creditors' Committee, with Exhibit A
5319	10/2/2019	Notice of Agenda of Matters Scheduled for Hearing on October 3, 2019 at 10:00 A.M.
5320	10/2/2019	Response of ESL Investments, Inc. and Transform Holdco LLC to Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors and Administrative Expense Claims Consent Program
5330	10/4/2019	Notice of Continuation of Hearing on Confirmation of Modified Second Amended Joint Chapter 11 Plan of Sears Holdings Corporation and its Affiliated Debtors
5333	10/7/2019	Notice of Filing of Revised Proposed Order Confirming Modified Second Amended Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors, with Exhibits A to B
5334	10/7/2019	Notice of Filing of (I) Revised Notice of Administrative Expense Claims Consent Program and Opt-In/Opt-Out Procedures, (II) Revised Ballot to Opt-In to Administrative Expense Claims Consent Program and (III) Revised Ballot to Opt-Out of Administrative Expense Claims Consent Program, with Exhibits A to D

Docket No.	Docket Entry Date	Description
5335	10/7/2019	Notice of Filing of Fourth Plan Supplement in Connection With Modified Second Amended joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors, with Exhibit A
5370	10/15/2019	Order (I) Confirming Modified Second Amended Joint Chapter 11 Plan of Sears Holdings Corporation and Its Affiliated Debtors and (II) Granting Related Relief, with Exhibits A to C
5399	10/17/2019	Notice of Appeal of ESL Investments, Inc. and Transform Holdco LLC to Confirmation Order, with Exhibit A
N/A	N/A	Copy of Bankruptcy Court Docket Report through October 31, 2019

HEARING TRANSCRIPTS

Docket No.	Docket Entry Date	Description
4800	8/9/2019	Transcript of Hearing Held on July 11, 2019
6 ⁵	8/9/2019	Transcript of Hearing Held on July 11, 2019
4928	8/21/2019	Transcript of Hearing Held on July 23, 2019
5007	8/27/2019	Transcript of Hearing Held on July 31, 2019
9 ⁶	10/16/2019	Transcript of Hearing Held on September 12, 2019
5395	10/7/2019	Transcript of Hearing Held on October 3, 2019
5396	10/9/2019	Transcript of Hearing Held on October 7, 2019

[Signature Page Follows]

⁵ This Docket No. reference refers to the docket in Adversary Proceeding No. 19-08262-rdd, which is under the lead bankruptcy case of Case No. 18-23538-rdd.

⁶ This Docket No. reference refers to the docket in Adversary Proceeding No. 19-08262-rdd, which is under the lead bankruptcy case of Case No. 18-23538-rdd.

Dated: New York, New York
October 31, 2019

CLEARY GOTTlieb STEEN & HAMILTON LLP

By: /s/ Thomas J. Moloney

Thomas J. Moloney

Sean A. O'Neal

Katherine R. Lynch

Chelsey Rosenbloom

One Liberty Plaza

New York, NY 10006

Telephone: (212) 225-2000

Facsimile: (212) 225-3999

*Attorneys for ESL Investments Inc. and certain of its
affiliates and Transform Holdco LLC*

WILMER CUTLER PICKERING HALE AND DORR
LLP

By: /s/ Philip D. Anker

Philip D. Anker

7 World Trade Center

250 Greenwich Street

New York, NY 10007

Telephone: (212) 230-8800

Facsimile: (212) 230-8888

*Attorneys for ESL Investments Inc. and certain of its
affiliates*